Supreme Court, U.S.
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79-1445

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79

LESLIE SCHMIDT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiori to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To:

THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, Leslie Schmidt, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 14, 1980, affirming a judgment of the United States District Court for the Western District of Pennsylvania, convicting petitioner of manufacture of methamphetamine in violation of 21 U.S.C. §841.

DECISION BELOW

The Court of Appeals affirmed without opinion. A copy of the Court's Judgment-Order is reproduced as appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code §1254(1). The judgment of the Court of Appeals, affirming the judgment of the District Court, was entered on February 14, 1980.

QUESTION PRESENTED

Whether a trial judge may consider a defendant's failure to become a government informant as a negative factor in sentencing?

STATEMENT OF FACTS

The indictment in this case, filed on June 15, 1978 charged petitioner with conspiracy (Count I), manufacture (Count II) and possession (Count III) of methamphetamine, based on the alleged manufacture of a single batch of slightly less than four kilograms of that controlled substance.

On September 6, 1978, petitioner pleaded guilty to those charges. After a pre-sentence report was prepared, he was sentenced, on October 31, 1978, to ten years incarceration and three years special parole on each count, the sentences to run concurrently. The judge repeatedly stressed that he was taking petitioner's failure to cooperate into consideration in imposing this sentence.

On August 27, 1978, the Federal Court of Appeals for the Third Circuit vacated petitioner's plea and sentence

and remanded the case for further proceedings. *United States v Schmidt* ____F.2d____Doc. No. 78-2459 (3d Cir. August 27, 1979).

On September 14, 1979 petitioner pleaded guilty to Count II in satisfaction of the indictment. The District Court proceeded immediately to sentence petitioner to the maximum possible term of incarceration — five years — and two years special parole. In doing so, the Court expressed the view that other persons as yet unapprehended, must have been involved with petitioner, and urged petitioner to identify those people. The Court also again indicated that it was taking petitioner's failure to cooperate into consideration at sentencing.

REASONS FOR GRANTING THE WRIT

POINT I

THE ISSUE RAISED IN THIS PETITION IS PRESENTLY BEING CONSIDERED BY THE COURT IN *ROBERTS V. UNITED STATES,* 78-1793.

On October 1, 1979, this Court granted certiorari in *Roberts v. United States,* 78-1793, a case which, like the present proceeding, raises the issue of whether a judge may properly consider a defendant's refusal to become a government informant as a negative factor in sentencing. A decision in defendant's favor in that case would require reversal in the present proceeding. Consequently, this Court should grant certiorari, or at least hold this case, pending decision in *Roberts.*

POINT II

THE DISTRICT COURT, BY CONSIDERING PETITIONER'S FAILURE TO BECOME A GOVERNMENT INFORMANT AS A NEGATIVE FACTOR IN SENTENCING, VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHTS.

Petitioner is a first time offender. Moreover, he was charged only with the manufacture of a single batch of methamphetamine, rather than any extended drug activity. Nevertheless, he was sentenced to five years, the maximum term of imprisonment which the judge could impose.

The judge made clear, at both of the sentencing proceedings in this case, that the principal reason why he was imposing such a harsh sentence on this first time offender was because petitioner had failed to cooperate. Thus, at the first sentencing proceeding on October 31, 1978, the judge repeatedly emphasized this factor:

THE COURT: The presentence report doesn't say much, because the defendant remains silent. I couldn't understand that, after a plea.

MR. ROSSETTI: Well, Your Honor, he remained silent on my advice because —

THE COURT: I know, on your advice, but he has pled.

MR. ROSETTI: Because of the appeal . . .

* * *

. . . we fully expect that at some point he will be subpoenaed before a grand jury.

Now, if give imunity, I have advised him to — that I would consider what he has to say in a different light; and if that were to happen, he is fully prepared to disclose all that he knows about these matters. Now —

THE COURT: That isn't much of an offer at this time, —

* * *

MR. ROSSETTI: Your Honor, it appears to me that what you are stating here is that Mr. Schmidt should disclose, under penalty —

THE COURT: This is a very, highly significant factor in the sentence which the Court is to consider. You know that. You have known it for years, that this is always a matter that a Court considers in sentencing.

MR. ROSSETTI: Your Honor, if it can be assured that this will not be used against him, he is prepared to --

* * *

THE COURT: You have chosen the course of action. You have considered it with your client, and we will ask him what he has to say, and we will make our determination on sentence now, under the facts as they are before us.

MR. ROSSETTI: Well, Your Honor, if you are telling us that you intend to penalize him more harshly because he has not given an account —

THE COURT: I'm not penalizing him more harshly or less harshly. I am considering all of the factors that you consider in imposing a sentence, one of which is the degree of cooperation which —

MR. ROSSETTI: He is fully prepared to cooperate.

THE COURT: Let him do so. I will pass sentence after he cooperates.

MR. ROSSETTI: Your Honor, if the government is prepared to offer him immunity as to what he says and it being used against him, he is prepared to do that. He is willing to do it.

It is not a question of being prepared, but it is a question of what might transpire if he is entitled to a suppression —

THE COURT: Well, all right. You're trying to bargain at this time, and I'm not going to take anything at this time. I'm going to impose sentence on the record as it exists before me at the present time.

* * *

THE COURT: Mr. Schmidt has neither told the Drug Enforcement people nor the United States Attorney nor any grand jury anything about this; and that's the state of the record today.

* * *

. . . since entering that plea, to my mind, you have told the government nothing that they didn't already know.

* * *

THE COURT: Well, I'm at the point where I am asking if there has been any indication of any cooperation, and there —

MR. ROSSETTI: And I said yes.

THE COURT: — and there has not.

MR. ROSSETTI: I said he is willing to do that.

THE COURT: After he exhausts the appeal process.

MR. ROSSETTI: No, no, no. No, no, no. If —

THE COURT: If he is willing to do that, I'm willing to continue this proceeding for a week and let him start talking to the authorities.

MR. ROSSETTI: Well, as I said before, if he is given immunity, — which I fully expect in this case. I expect the government to do just what they did with the other co-defendants, to subpoena them before a grand jury after getting the Court to grant immunity.

THE COURT: You are aware, because you have tried it before, that we have 120 days from the last —

MR. ROSSETTI: Yes.

THE COURT: — decree in this case to ask the Court to reconsider.

MR. ROSSETTI: I understand, Your Honor, but —

THE COURT: You often do that when there is no basis for it, but you don't fail to ask for that.

MR. ROSSETTI: I understand, Your Honor, but what I talking about here is, you ask —

THE COURT: But the difficulties which the defendant may raise, you know, in the meantime in the appeal process — Now if you wait till the last appeal and then he decides to discuss the matter under immunity, —

MR. ROSSETTI: Your Honor, I don't know —

THE COURT: — the Court isn't awfully impressed.

MR. ROSSETTI: Your Honor, I can't be any more clear than stating, as I did at the outset of this sentencing hearing, that Mr. Schmidt is fully willing and prepared to testify —

THE COURT: After he has exhausted all the avenues of appeal —

MR. ROSSETTI: No. After he is granted immunity.

THE COURT: — and then he is called in and then he is granted immunity, he is going to tell what they are going to do. But he hasn't done it now, and so I have no basis now for —

MR. ROSSETTI: Again, Your Honor, I would like to state this and make it clear: There is no precondition of an exhaustion of appeals before he is willing to testify.

THE COURT: All right.

* * *

THE COURT: His attitude is one of non-cooperation with the government at the present time.

MR. ROSSETTI: Even though I have stated on the record that he is willing to do this?

I don't know how much clearer I can make it.

THE COURT: You told me he is willing, but he pled guilty two months ago and he hasn't said a word. He didn't say a word in his presentence investigation. He doesn't say it now.

MR. ROSSETTI: Your Honor, I do not understand—

THE COURT: This is a person who evaded capture at the time of the raid, saw his brother and close friend go to prison and get a contempt sentence, also, for their failure to talk . . .

He has known everything that's going on. He has seen these two go to prison. He has seen these two accept a sentence of contempt when they refused to talk when they were called before a grand jury and granted immunity.

MR. ROSSETTI: And are you suggesting —

THE COURT: So this suggests to me that his non-cooperative attitude is similar to theirs.

Because this is an operation that could not have succeeded without a great deal of help from other persons. You don't manufacture a large supply of these materials out in the woods without having some sense or some knowledge of a scheme of distribution.

In his first appeal to the Third Circuit, petitioner argued that these improper considerations invalidated his sentence. *United States v. Schmidt,* 78-2459: Appellant's brief at Point III. That Court found it unnecessary to reach that issue, however, since it set aside petitioner's sentence on other grounds. *United States v. Schmidt* ____F2d____ (3d Cir., August 27, 1979).

At the resentencing in this case, however, the trial judge clearly indicated that this consideration was still paramount in his determination of the sentence to be imposed. Thus, the judge, insisting that other people must have been involved in criminal activity with petitioner, occupied the better part of the plea proceedings trying to get petitioner to identify those people. And later, while defense counsel was asking the Court to be lenient in sentencing, the judge interrupted, indicating that he felt that petitioner's failure to cooperate precluded such leniency:

> THE COURT: You say 'got involved.' I'm just asking him how he got involved and he doesn't want to tell me.

Conditioning leniency in sentencing on a defendant's willingness to provide incriminating information to the government violates a defendant's Fifth Amendment right against self-incrimination. *United States v. Ramos,* 572 F.2d 360, 362 (2d Cir. 1978); *United States v. Garcia,* 544 F2d 681, 684-5 (3d Cir., 1976); *United States v. Rogers,* 504 F.2d 1079, 1084-85 (5th Cir. 1974); *United States v. Acosta,* 501 F.2d 1330, 1337-38 (5th Cir. 1974), *dissenting opinion adopted en banc,* 509 F.2d 539 (5th Cir. 1975); *Scott v. United States,* 419 F.2d 264 (D.C. Cir. 1969); *Le Blanc v. United States,* 391 F.2d 916 (1st Cir. 1968); *cf. Whitfield v. United States,* 401 F.2d 480 (9th Cir. 1968).

Petitioner is therefore entitled to resentencing at a proceeding in which his failure to cooperate will not be held against him.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
March 6, 1980

Respectfully submitted,

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APPENDIX "A"
JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2379

UNITED STATES OF AMERICA

vs.

LESLIE SCHMIDT
ALANA SCHMIDT

LESLIE SCHMIDT,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 78-00148-01)

Submitted Under Third Circuit Rule 12(6)
February 12, 1980
Before: ALDISERT, WEIS and HIGGINBOTHAM,
Circuit Judges.

After considering the contentions raised by appellant, to wit, that (1) the district court violated appellant's constitutional rights by considering his failure to cooperate as a negative factor in sentencing and (2) the district court erred in sentencing appellant immediately after his plea

was entered without ordering an updated presentence report or giving any valid reason for failing to do so; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/
Circuit Judge

Attest:
s/Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated February 14, 1980

FILED
MAY 6 1980
CLERK

No. 79-1445

In the Supreme Court of the United States

OCTOBER TERM, 1979

LESLIE SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1445

LESLIE SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly considered his failure to cooperate with the government in determining his sentence.[1]

1. In September 1978, petitioner entered a conditional guilty plea to a three-count indictment charging that he had possessed and manufactured methamphetamine, in violation of 21 U.S.C. 841, and had conspired to commit

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[1]The judgment of the court of appeals in this case was entered on February 14, 1980 (Pet. App. 2a). The petition for a writ of certiorari was filed on March 17, 1980, and is therefore two days out of time under Rule 22(2) of the Rules of this Court.

those offenses, in violation of 21 U.S.C. 846. He was sentenced to concurrent ten-year terms of imprisonment to be followed by a three-year special parole term.[2]

The court of appeals reversed because the district court had failed to hold a hearing on petitioner's motion to supppress certain evidence. 604 F. 2d 236 (1979). On remand, petitioner pleaded guilty to one count in the indictment in exchange for a dismissal of the remaining counts (Tr. 3, 14, 23-24). The district court sentenced petitioner to five years' imprisonment to be followed by a two-year term of special parole (Tr. 28-29). The court of appeals affirmed (Pet. App. 1a-2a).

2. Petitioner claims (Pet. 3-8) that the district court improperly considered his failure to cooperate with the government prior to imposition of his second sentence. He also claims that this amounted to an impermissible penalty for exercising his Fifth Amendment rights (*ibid.*).

However, this Court's recent decision in *Roberts* v. *United States*, No. 78-1793 (Apr. 15, 1980), establishes that it is proper for the district court to take into consideration the uncooperative conduct of a defendant before imposing sentence. In addition, the record in this case fails to support petitioner's claim that his sentence was enhanced based either on his refusal to name his accomplices or on his exercise of Fifth Amendment rights.

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[2]The maximum term of imprisonment to which petitioner was subject on any one count was actually only five years because his offenses did not involve narcotics. See 21 U.S.C. 802(16), 841(b)(1)(B). This error was corrected by the district court when petitioner was resentenced (Tr. 16-17). ("Tr." refers to the transcript of petitioner's second sentencing hearing, held on September 14, 1979.)

During petitioner's first sentencing hearing, the district court did consider the extent of petitioner's cooperation (see Pet. 4-7). But the court was careful to explain that it was not enhancing petitioner's sentence based on that factor: "I'm not penalizing him more harshly or less harshly. I am considering all of the factors that you consider in imposing a sentence * * *" (*id.* at 5). On appeal, petitioner contended that even this limited consideration of the extent of his cooperation violated the then prevailing rule in the Third Circuit. See *United States* v. *Garcia*, 544 F. 2d 681 (3d Cir. 1976). The court of appeals noted petitioner's contentions based on *Garcia* (see 604 F. 2d at 237 n.3) but reversed his conviction and sentence on other grounds.

After the court of appeals reversed and remanded the case, the district court conducted a second sentencing hearing. At that time, the district court made no reference to petitioner's lack of cooperation and did not suggest that petitioner was being punished for exercising any constitutional right. To the contrary, the district court indicated that it was taking into account petitioner's untruthfulness in answering the court's questions during the guilty plea and sentencing hearing. During the hearing, the district court inquired into the factual basis for the guilty plea (Tr. 18). The court asked petitioner how he produced methamphetamine, where he obtained the necessary equipment and materials, and where he learned how to manufacture the substance. Petitioner stated that he had learned how to manufacture methamphetamine through study in various public libraries, although he could not recall the names of the books that he purportedly read (Tr. 19). The district court

found petitioner's explanation to be "completely incredible," adding that "[n]o reasonable man could believe it" (Tr. 21-22).

Petitioner's attorney argued in favor of leniency before the district court, asserting that petitioner had been a model prisoner after his original conviction and that he had been involved in criminal activity only once. The district court stated in response (Tr. 27):

> You said got involved. I'm just asking him how he got involved and he doesn't want to tell me * * * You know it's incredible that any reasonable man would accept this explanation of his. It's rather insulting of him to give it to the Court.

At no time did the district court indicate that it was punishing petitioner for exercising any constitutional right.[3] The court's sole references were to the severity of petitioner's offense and the fact that he had lied under oath during the guilty plea and sentencing hearing.[4]

The district court's consideration of petitioner's willingness to lie to the court under oath was wholly proper. See *United States* v. *Grayson*, 438 U.S. 41 (1978). Moreover, even if the district court had considered petitioner's refusal to cooperate as a negative sentencing factor, that too is a permissible consideration as recently

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[3]Petitioner freely identified two other participants in the scheme—his brother, Alan Schmidt, and Anthony Emrisko. He testified that no one else was involved (Tr. 22).

[4]The court accepted the representation of defense counsel that petitioner had a favorable record in prison following his first conviction: "It's been represented to me that he has an exemplary record and I will take that as established * * *" (Tr. 25).

confirmed by this Court in *Roberts* v. *United States*, *supra*. Since petitioner's sentence was imposed within statutory limits, the court below properly declined to disturb it on appeal. *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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[5]Because the record of petitioner's second sentencing hearing contains no indication that the district court enhanced his sentence based on an exercise of Fifth Amendment rights, petitioner's reliance on the Fifth Amendment to attack his sentence is wholly misplaced.